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THE END OF LAW AS DEVELOPED IN LEGAL RULES AND DOCTRINES.

I. SOCIAL JUSTICE AND LEGAL JUSTICE.[1]

IT is said that law is the body of rules and principles in accordance with which justice is administered by the authority of the state. In other words, the object of law is the administration of justice. At the outset, then, we are met by the question, what is justice? What is the end which we seek to attain through the legal system? This question may be taken up historically or philosophically. We may inquire what is the end of law as it has developed in legal rules and doctrines and as it has developed in juristic thought. On the other hand we may inquire what ought to be conceived as the end of law. We may ask, what do economics, politics and ethics point out as the purpose toward which the legal system is to be directed? Pursuing these inquiries, one

NOTE. — The substance of this paper will appear in a forthcoming book to be entitled "Sociological Jurisprudence."

[1] See my paper, Social Justice and Legal Justice (address before the Allegheny County Bar Ass'n at Pittsburg, April 5, 1912), 75 Central Law Journal, 455. On the subject of the end of law reference may be made to Miller, The Data of Jurisprudence, chap. 6; Salmond, Jurisprudence, § 9; Pulszky, Theory of Law and Civil Society § 173; Bentham, Theory of Legislation, Principles of the Civil Code, pt. I, chaps. 1–7; Holland, Jurisprudence, chap. 6; Gareis, Vom Begriff Gerechtigkeit; Demogue, Notions fondamentales du droit privé, 119–135. See also Kant, Metaphysische Anfangsgründe der Rechtslehre, Einleitung in die Rechtslehre, 2 ed., § C, pp. xxxiii ff. (Hastie's transl. pp. 45–46); Spencer, Justice, chaps. 5, 6; Willoughby, Social Justice, chap. 2; Sidgwick, The Methods of Ethics, chap. 5; Paulsen, Ethics (Thilly's transl.), chap. 9; Dewey and Tufts, Ethics, chaps. 20–24.

quickly perceives a significant divergence between the idea of the end of law which had developed in actual rules and doctrines and obtained in juristic thought at the end of the nineteenth century, on the one hand, and the idea of justice which had come to obtain in the other social sciences. So marked was this divergence that the promoters of social legislation did not hesitate to contrast what they called legal justice with social justice.[2]

Many examples of the divergence between the nineteenth-century legal conception of justice and the conception which came to obtain in the other social sciences at the end of that century might be cited. But one will suffice for our purpose, namely, the course of decision of the courts from 1890 to 1900, and in some of our courts down to 1910, upon the subject of liberty of contract. Two of our state courts, in passing adversely upon labor legislation because it infringed upon a theoretical equality of contract, noted the frequency of such legislation in recent times, but said (one of them as late as 1902) that it was not necessary to consider the reasons therefor.[3] Another court asked what right the legislature had to "*assume* that one class has need of protection against another."[4] Another court said gravely that the remedy for the company-store evil was "in the hands of the employee," since he is not compelled to buy from the employer;[5] overlooking that there may be a compulsion in fact where there is none in law.[6] Another

[2] Is Class Conflict in America Growing and is It Inevitable? American Journal of Sociology, XIII, 764. See also Ross, Social Psychology, 211–212. A number of instances are collected in my papers, Do We Need a Philosophy of Law, 5 Columbia L. Rev. 339; Liberty of Contract, 18 Yale L. Journ. 454.

[3] Lowe *v.* Rees Printing Co., 41 Neb. 127, 135; State *v.* Kreutzberg, 114 Wis. 530, 537. It must be said, however, that at least one of these courts would not take such a position to-day. See Borgnis *v.* Falk Co., 147 Wis. 327.

[4] State *v.* Haun, 61 Kan. 146, 162.

[5] State *v.* Fire Creek Coal & Coke Co., 33 W. Va. 188, 190. While the court was laying down this academic proposition, those who had studied the actual situation were pointing out that the contrary was true in fact. "He is not free to make such a contract as might please him because, like every party to a contract, he must come to such conditions as can possibly be agreed upon. He is less free than the parties to most contracts, and, further, he cannot utilize his labor in many directions; he must contract for it within restricted lines." Wright, Practical Sociology, 5 ed., 226.

[6] "Probably the modification of this general principle [assumption of risk] by some judicial decisions and by statutes like [the Federal Safety Appliance Act] . . ., is due to an opinion that men who work with their hands have not always the freedom and equality of position assumed by the doctrine of *laissez faire* to exist." Holmes, J., in Schlemmer *v.* Buffalo R. & P. R. Co., 205 U. S. 1.

said that "theoretically there is among our citizens no inferior class" [7] — and, of course, no facts could avail against that theory. Because it violated a theoretical abstract equality, legislation designed to give workers some measure of practical independence under the actual conditions of modern industry, was said by state courts at the end of the nineteenth century to put them under guardianship,[8] to create a class of statutory laborers,[9] and to stamp industrial laborers as imbeciles.[10] As late as 1908, even the Supreme Court of the United States dealt with the relation of employer and employee in railway transportation as if the parties were farmers haggling over the sale of a horse.[11] Only the other day, the highest court of New York told us that a workmen's compensation act "does nothing to conserve the health, safety or morals of the employees." [12] This artificial type of reasoning is fast disappearing from the books in this particular connection. Today it does not need to be refuted outside of a decreasing minority of our state courtrooms. The Supreme Court of the United States abandoned it definitely some years ago.[13] But the type of reasoning of which it is an example is not extinct. When that

[7] Frorer *v.* People, 141 Ill. 171, 186, holding adversely to a statute prohibiting company stores and requiring miners to be paid weekly.

[8] Braceville Coal Co. *v.* People, 147 Ill. 66, 74 (coal to be weighed for fixing wages); State *v.* Haun, 61 Kan. 146, 162 (wages to be paid in money).

[9] People *v.* Beck, 10 Misc. (N. Y.) 77 (dissenting opinion of White, J.). The statute fixed hours of labor on municipal contracts.

[10] State *v.* Goodwill, 33 W. Va. 179, 186 (statute against payment in store orders). Another court said such legislation was insulting to the manhood of laborers. Godcharles *v.* Wigeman, 113 Pa. St. 431, 437 (wages in iron mills to be paid in money). In Lochner *v.* New York, 198 U. S. 45, 57, Peckham, J., said: "They are in no sense wards of the state." Compare also the language of Harlan, J., in Adair *v.* United States, 208 U. S. 161, 175: "The right of a person to sell his labor upon such terms as he deems proper, is in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the service of such employee. . . . In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land." See the comments upon this case in Mr. Olney's paper, 42 American L. Rev. 164.

[11] Adair *v.* United States, 208 U. S. 161, 175.

[12] Ives *v.* South Buffalo R. Co., 201 N. Y. 271.

[13] McLean *v.* Arkansas, 211 U. S. 539; Chicago, B. & Q. R. Co. *v.* McGuire, 219 U. S. 549, 566–575.

type of reasoning is repeated in some of our state courts, sociologists and economists are justified in the angry retorts with which they meet it. It is not necessary to quote recent critiques of the decision upon the workmen's compensation act in New York. Speaking of prior cases, Ward said: "Much of the discussion about equal rights is utterly hollow. All the ado made over the system of contract is surcharged with fallacy." [14] Professor Ely said of the reasoning in the same cases: "For one who really understands the facts and forces involved, it is mere juggling with words and empty legal phrases." [15] "Deadening and monotonous toil too long continued," said Professor Seager, "is much more inimical to the spirit of independence than any amount of legislation." [16]

As will be shown presently, a change has been taking place, and at some points this change is going forward rapidly. But as yet there are only beginnings. On the whole we must admit the divergence between legal thought, as it had proceeded up to the present decade and as it now proceeds for the most part in America, upon the one hand, and economic and sociological thought upon the other hand. Hence we have not merely to ask, what is the legal idea of justice? It is of no less moment to know why this idea differs from the economic and sociological idea of justice. We have to ask, why did the legal idea come to be what it is and why does it so persistently remain such?

The actual legal doctrines of the place and time have always so completely influenced the legal ideal of that place and time that the development of the one must be understood in order to understand the other. Hence the several questions put must be approached historically. The first inquiry, then, should be, what is the end of law as it has developed in legal rules and doctrines?

2. Archaic Law.[17]

In the beginnings of law the idea is simply to keep the peace. In primitive law justice, in the sense of the end of the legal system,

[14] Applied Sociology, 281.

[15] Economic Theory and Labor Legislation, 18.

[16] Introduction to Economics, 3 ed., 423.

[17] Holmes, The Common Law, Lect. I; Jenks, Law and Politics in the Middle Ages, chap. 4; Maine, Ancient Law, chap. 10; Clark, Early Roman Law, The Regal Period; Strachan-Davidson, Problems of the Roman Criminal Law, chap. 3; Westermarck,

was a device to keep the peace. Whatever served to avert private vengeance and prevent private war was an instrument of justice. The law existed as a body of rules by which controversies were adjusted peaceably. At first, therefore, it attempted nothing more affirmatively than to furnish the injured person a substitute for revenge. Where modern law thinks of compensation for an injury, archaic law thought of composition for the desire to be avenged. Where modern law seeks a rational mode of trial that will bring forth the exact truth, archaic law sought an acceptable mechanical mode of trial, which would yield a certain, unambiguous result, without opportunity for controversy and consequent disturbance of the peace.

Primitive society recognized three ways in which an injured person might obtain redress: (1) by self help, (2) by the help of the gods or of their ministers, and (3) by the help of the state or political organization. The first meant in antiquity redress by the help of oneself and of his kinsmen, so that reprisals, private war and the blood feud are ordinary institutions of primitive society for the redress of injuries.[18] But a condition in which self help and private war are normal processes of society is the very antithesis of the legal order. Accordingly in its beginnings law is a means toward the peaceable ordering of society. Along with religion and morality, it is a regulative agency by which men are restrained and the social interest in general security is protected.[19] And it retains this character of a regulative agency and of a means of which the end is a peaceable ordering, although other ends become manifest as it develops. To establish this peaceable ordering two tasks had to be undertaken, (1) to regulate self help and ultimately supersede it, (2) to prevent aggression. The former was quite as important as the latter. For while ag-

Origin and Development of the Moral Ideas, I, 175–185, 477–491; Hobhouse, Morals in Evolution, I, 79–133; Post, Ethnologische Jurisprudenz, vol. II, bk. 4; Leist, Graeco-Italische Rechtsgeschichte, §§ 28–53; Amira, Grundriss des germanischen Rechts, chaps. 4 and 6.

[18] Dareste, Le droit des représailles, Nouvelle études d'histoire du droit (1902), 38; Leist, Altarisches Jus Gentium, § 68; Post, Ethnologische Jurisprudenz, §§ 58, 62; Fehr, Hammurapi und das salisches Recht, chap. 5; Brunner, Deutsche Rechtsgeschichte, II, § 22; Maurer, Altnordische Rechtsgeschichte, V, pt. I.

[19] "Religion, law, and morality cover the area of human action with rules and sanctions." Stubbs, Lectures on the Study of Medieval and Modern History, 336. *Cf.* Salmond, First Principles of Jurisprudence, 17–18.

gression upon individuals did affect the social interest in general security, no small part of this effect was due to the certainty that such aggression would lead to private war.[20] Hence the original problem of the law was to narrow the field of self help, to regulate self redress and finally to supersede it by peaceful modes of redress. One step in this direction was to protect self redress when used to obtain satisfaction for injury to a recognized interest. In such cases the law endeavored to prevent the wrongdoer or his kindred from interfering with self redress by the person wronged or his kindred.[21] Another step was to put limitations upon the prosecution of private war and of the blood feud.[22] In time the

[20] Hence, the Anglo-Saxon laws often do not denounce the original aggression but the denial of justice by the wrongdoer afterward. For example: "That is, then, that no man deny justice to another; if any one do so, let him make *bot* [*i. e.*, composition] as it before is written." Laws of King Edward, 4 (Thorpe's transl.). *Cf.* Laws of Ine, 8; Athelstan, 3.

[21] *E. g.*, "And if it should happen that any kin be so strong and so great, within land or without land, whether XII-hynde or twy-hynde, that they refuse us our right and stand up in defense of a thief, that we all of us ride thereto with the reeve within whose *manung* it may be." Judicia Civitatis Lundoniae, VIII, 2.

[22] The Anglo-Saxon Laws contain many provisions against proceeding by distress or other form of self-redress before demand of justice or without leave of the *gemot*. *E. g.*, Ine, 9: "If any one take revenge before he demand justice, let him give up what he has taken and pay, and make *bot* with thirty shillings." See also Cnut, 19. Compare the decree of the Diet of the German Empire at Nürnberg (1187): "We decree and direct . . . that he who intends to do damage to another or to injure him shall give notice to him at least three days before by a sure messenger." Also: "Whoever is going to contend about a freeman or a slave, shall not lead him away before trial." Twelve Tables of Gortyna, § 1 (Roby's transl., 6 L. Quart. Rev. 142). See also the limitations on distress in the Brehon Law, Maine, Early History of Institutions, Lect. II.

Elaborate regulations of the feud may be seen in Alfred's Laws, 42; Edmund's Laws, 7. See also the Decree of the Emperor Henry IV Concerning a Truce of God (1085), translated in Henderson, Historical Documents of the Middle Ages, 208. Compare: "If any one is killed violently, reprisals by seizing men (*τὰς ἀνδροληψίας*) to be a right of his nearest relatives until justice is done for the murder or the murderers are surrendered. But this right of reprisal to extend to three men and no more." Law of Draco, quoted by Demosthenes, Against Aristocrates, § 96. Also the limitation upon the feud in the Salic Law, tit. 57, and the regulations as to the persons who may prosecute the feud and who shall be liable thereto in the Laws of Howel the Good, Evans, Welsh Medieval Law, 187. See also Dareste, Le prix du sang, Nouvelle études d'histoire du droit (1902) 1–11.

The Germanic institution of the truce or peace which, under the form of the king's peace, plays so important a part in the history of the common law, is another example. Still another may be found in the provisions in archaic codes as to the extent and manner of retaliation. *E. g.*, Hammurabi, §§ 196–214; Twelve Tables, VIII, § 2; Manu, VIII, 279 ff.; Abdur Rahim, Muhammadan Jurisprudence, 358–359.

law was strong enough to eliminate private war entirely,[23] and it remained only to limit self help and self redress to those few cases where, from the very nature of the legal administration of justice, vital social or individual interests would be without protection unless the individual might act summarily and vigorously.[24]

Redress by the help of the gods or of their ministers, where the wrong was an impiety — an affront to the gods, thus endangering the community that harbored the offender[25] — furnished the law its first effective weapon through the development of what may fairly be called excommunication into outlawry.[26] Corresponding to the three regulative agencies above referred to, the Romans recognized three bodies of rules: *Fas*, that which accorded with the will of the gods, ascertained through religion and enforced in theory through supernatural sanctions and in practice through pontifical penalties;[27] *boni mores*, that which accorded with the settled custom of men, resting in tradition and sanctioned by social pressure,[28] and law, ascertained by agencies of the state and sanctioned by the force of the state. Of the three, law had behind it the weakest force in primitive society; but with the rise of the state it took over more and more the whole task of regulation and of

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[23] The whole history of this matter, so far as the Teutonic laws are concerned, is well set forth in Jenks, Law and Politics in the Middle Ages, chap. 4.

[24] In Roman Law, see Dig. IV, 2, 13, IX, 2, 45, § 4, XLIII, 16, 1, § 27; Cod. VIII, 4, 7. See also Muirhead, Historical Introduction to the Private Law of Rome, 2 ed., 102. In the common law, see 3 Blackstone, Commentaries, 1–16. It should be noted that of the six cases for self-help discussed by Blackstone, the third and the sixth are now obsolete and the fifth is much restricted by statutes.

[25] See, for example, the plague sent upon the whole host for the impiety of Agamemnon, Iliad, bk. I. *Cf.* Jenks, Law and Politics in the Middle Ages, 57: "A new departure is full of dangers, not only to the man who takes it, but to those with whom he lives, for the gods are apt to be indiscriminate in their anger."

[26] Post, Ethnologische Jurisprudenz, II, § 68; Strachan-Davidson, Problems of the Roman Criminal Law, chap. 1; Muirhead, Historical Introduction to the Private Law of Rome, 2 ed., 52–54; Wilda, Strafrecht der Germanen, 278–280.

[27] Jhering, Geist des römischen Rechts, 3 ed., I, §§ 18, 18 *a*; Danz, Der sakrale Schutz im römischen Rechtsverkehr, 47 ff. Compare the penalties by way of penance in Hindu Law, Manu, XI, 49 ff. Also similar "sanctions" in the Brehon law, Maine, Early History of Institutions, Lect. II.

[28] Voigt, XII Tafeln, I, § 15. But this pressure exerted by the *gens* upon its members and the *collegium* upon its fellows was no mean regulative agency. The power of the king as censor of morals, which was exercised by the *censor* under the Republic, was developed by the *praetor* so as to make of *infamia* a legal institution. See Greenidge, Infamia in Roman Law, chaps. 3, 4.

preserving the peace. Upon the negative side, law achieved its task by doing away with private war, and greatly limiting self redress, by devising purely mechanical modes of trial,[29] and by endeavoring to satisfy the desire for vengeance of the individual who might not now help himself.[30] That endeavor was the first step toward a wider conception of the end of legal systems, the first step toward recognition of an end beyond mere keeping of the peace, toward which the peaceable ordering of men is but a means and the achievement whereof involves the securing of peace and order.

There are, accordingly, five noteworthy characteristics of archaic law.

(1) The measure of what the person wronged may exact is not the extent of the injury done but the extent of the desire for vengeance awakened. As was said at the outset, the idea is not compensation but composition.[31] This still survives to some extent in retributive theories of punishment.

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[29] "In these trials there are various conceptions: the notion of a magical test . . . that of a call for the direct intervention of a divine justice . . .; that of a convenient form or formula, sometimes having a real and close relation to the probable truth of fact, and sometimes little or no relation to it, like a child's rigmarole in a game — good at all events for reaching a practical result; that of regulating the natural resort of mankind to a fight; that of simply abiding the appeal to chance. . . . But what we do not yet find, or find only in its faint germs, is anything such as we know by the name of a trial, any determination by a court which weighs this testimony or other evidence in the scale of reason and decides a litigated question as it is decided now. That thing, so obvious and necessary, as we are apt to think it, was not worked out for centuries." Thayer, Preliminary Treatise on Evidence, 9–10.

[30] This is especially marked in the rules of archaic law as to injuries by slaves, animals, and inanimate things, *e. g.*, the Roman law as to noxal surrender, Gaius, IV, §§ 75–78. *Cf.* law of Draco, quoted by Plutarch, Life of Solon: "He enacted a law for the reparation of damage received from beasts. A dog that had bit a man was to be delivered up bound to a log four cubits long."

[31] See, for example, Laws of Ethelbert, 59, 60: "If the bruise be black in a part not covered by the clothes, let *bot* be made with thirty scaetts. If it be covered by the clothes, let *bot* be made for each with twenty scaetts." See also Salic Law, Title XIV, §§ 1–3; the Roman law as to *furtum manifestum* and *furtum nec-manifestum*, Gaius, III, §§ 183–192; Laws of Howel the Good, Evans, Welsh Medieval Law, 190–191, "A person's fore tooth is twenty four pence in value with three augmentations; and when a fore tooth is paid for, the worth of a conspicuous scar is to be paid with it. . . . There are three conspicuous scars upon a person: a scar on a person's face, valued at six score pence; a scar on the back of the right hand, valued at sixty pence; a scar on the back of the right foot, valued at thirty pence." According to the last, the permanent loss of two joints of the thumb (seventy-six pence halfpenny) did not call for so much as a scar upon the face.

(2) The rules of law are in the highest degree formal. This characteristic must be considered in connection with the next period of legal development.

(3) Modes of trial are not rational but mechanical, since the end is to reach a peaceable solution, not to determine the truth exactly in order to apply a remedy with precision. In this respect, arbitration in international law often affords a suggestive parallel.[32]

(4) The scope of the law is very limited.[33] There are no principles or general ideas. The law is made up of regulations as to self help, provisions for the special cases where one may have the active assistance of the king or magistrate,[34] a tariff of compositions[35] which the injured person or kindred must accept for the wrongs specified, payment whereof, also, may be compelled, and another tariff of penalties which the state (or the king) may exact to buy off its vengeance for the affront to its dignity involved in certain wrongs.[36]

(5) The legal unit is not so much the individual as a group of kindred.[37]

Many of these characteristics of the beginnings of law persist into the period of a true legal system. For a long time the develop-

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[32] Westlake, International Law, I, 343.

[33] *E. g.*, "Further he [Hippodamus of Miletus, fifth century B. C.] held that there were but three kinds of laws, as the possible subjects of judicial procedure were but three, namely, assault, trespass and homicide." Aristotle, Politics, II, 8.

[34] These rules turn into a law of procedure. Even at a relatively late period of legal development the law is stated in the form of a system of actions and rules as to the cases in which they will lie. The register of writs in the common law and the praetor's edict in Roman law illustrate this.

[35] These tariffs of compositions are the staple of ancient codes: Hammurabi, §§ 198, 201, 203–204, 207–209, 211–214, 216–225; Twelve Tables of Gortyna, §§ 2–3; XII Tables, VIII, 2; Salic Law, tits. 2, 3, 11, 13, 14, 15, 17, 19, 30, 34, 41, 55; Ethelbert, §§ 16–72; Laws of Howel the Good, Evans, Welsh Medieval Law, 190–191.

[36] Thus, the provisions for *wite* in the Anglo-Saxon laws. Reminiscences of this may be seen in the conclusion of indictments, "against the peace and dignity" of the sovereign, and in the "fine," or in our old books, "ransom," literally a making peace with the sovereign for a misdemeanor by paying a sum of money.

[37] See the Athenian law as to reprisals, *supra*, note 22; Salic Law, tit. 57; Alfred, § 27; Edmund, 1, 4. "If breach of the peace be committed in a fortified town, let the inhabitants of the town themselves go and get the murderers, living or dead, or their nearest kinsmen, head for head." Ethelred, II, 6. "And if any one charge one in holy orders with the feud and say that he was a perpetrator or adviser of homicide, let him clear himself with his kinsmen who must bear the feud with him or make *bot* for it." Ethelred, IX, 23.

ment of legal justice consists in getting away from them, as the conception of the end of law shifts from that of a mere keeping of the peace, of which these characteristics are for the most part corollaries, under the conditions of primitive society, to the broader ones, first of preserving the social status quo, and later of permitting the widest possible individual self assertion. The contribution of this period of legal development to the idea of justice is the conception of a peaceable ordering of society through the peaceable adjustment of controversies.

3. The Strict Law.[38]

In a second stage of legal development, represented by the *ius ciuile* in Roman law and by the common law, or the law, as opposed to equity and to statutory modifications, in our own system, law has definitely prevailed as the regulative agency of society and the state has prevailed as the organ of social control. Moreover self help and self redress have been definitely superseded for all but exceptional causes. Normally, men appeal only to the state to redress wrongs. Hence the body of rules determining the cases in which men may appeal to the state for help comes to define indirectly the substance of rights and thus indirectly to point out and limit the interests recognized and secured. In this stage two causes operate to produce a system of strict law, namely, fear of arbitrary exercise of the power of state assistance to individual victims of wrong, and survival of ideas from the earlier period, that is, ideas proper to the beginnings of law. The chief end which the legal system seeks is certainty. Hence the cases in which the state will interfere, the mode in which it will interfere and the manner in which its interference may be invoked are defined in an utterly hard and fast way. The rules of law are wholly inelastic and inflexible.

Five characteristics of this stage of legal development may be noted: (1) Formalism, the law refuses to look beyond and behind the form; (2) rigidity and immutability; (3) extreme individualism; (4) entire indifference to the moral aspects of conduct or of transactions which satisfy the letter of the law, so that, to use Ames's phrase, the law is not immoral but unmoral; (5) restriction of rights to *legal* persons so that all human beings are not legal persons,

[38] Jhering, Geist des römischen Rechts, II, §§ 45–47 *d.*

and arbitrary restriction of legal capacity. These characteristics of the strict law affect the whole course of development of legal justice.

Formalism is also a characteristic of the beginnings of law. It belongs to the *Vorgeschichte* of law as well as to the history of law as a system, and, indeed, persists into and beyond the period of strict law from the first stage.

Procedure is the first department of law to be developed. Hence it acquires a formal character in the period of strict law [39] which, in American law, it has not yet thrown off. To many this formal character of procedure has seemed essential. Thus in Greek law if a plaintiff sued for twenty minae and could prove only eighteen due, the issue being whether twenty were due, a verdict for the defendant was required.[40] Hippodamus of Miletus, a writer on politics of the fifth century B. C., objected to this rule, proposing that a third course, namely, to find for the plaintiff as to a part of his claim, should be opened to the triers. In commenting upon this proposal, Aristotle pronounces it impossible in courts of law because it converts the trier into an arbitrator. To the point made by Hippodamus that the trier was compelled by the rule to perjure himself, Aristotle answers:

"And further no one compels a juror to perjure himself if he returns a verdict of simple acquittal or condemnation [41] where the accusation is

[39] The classical example is in Gaius, IV, § 11: "Hence when one who sued for vines cut down named vines in his action, response was made that he lost his suit because he should have named trees, since the law of the Twelve Tables upon which the action for vines cut down lay, spoke generally of trees cut down." The doctrine of theory of the pleading, which is just disappearing from American law, is strictly comparable. Under that doctrine, a modern version of the common-law strict forms of actions, the tribunal tries, not the plaintiff's case, but his theory of it, so that reversal of a judgment may be necessary in order that the same case be tried over on the same evidence and to attain the same result, but on a formal statement of another theory. A striking application of this doctrine may be seen in Allen *v.* Tuscarora V. R. Co., 229 Pa. St. 97.

[40] This is a common notion of archaic law. Compare the doctrine of *plus petitio* in Roman law, Gaius, IV, §§ 53–60, and the common-law rule in the action of debt. "In an action of debt the plaintiff must prove the whole debt he claims or recover nothing at law." Blackstone, Commentaries, III, 155.

[41] "Acquit" and "condemn" are used in the same sense as in Roman procedure. Just as our procedure, influenced by the action of trespass, speaks of "damages" even where the liquidated sum due on an instrument is recovered, Greek and Roman procedure, influenced by the action to enforce a penalty for a delict, spoke of condemnation or acquittal of the defendant.

duly preferred in simple terms. For a juror who votes acquittal decides not that the defendant owes nothing but that he does not owe the twenty minae claimed, and the only person guilty of perjury is a juror who returns a verdict for the plaintiff when he does not believe that the defendant owes the twenty minae." [42]

In other words, Aristotle could see no mean between a strict rule that restricted the finding to a bare yes or no upon the letter of the claim and a turning of the cause over to arbitration, that is, to justice without law. Yet the strict law itself outgrew the rule which Aristotle thought essential,[43] and later apologists for ultra-formal procedure conceived instead that a bare passing upon the theory of his case presented by the plaintiff was essential to the legal administration of justice.[44] In reality both requirements grew out of the necessities of the purely mechanical modes of trial which obtain in the beginnings of law and have no place in a modern system.[45]

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[42] Politics, II, 8 (Welldon's transl.).

[43] As to *plus petitio*, see Institutes, IV, 6, § 33. As to debt at common law, see McQuillin *v.* Cox, 1 H. Bl. 249 (1789).

[44] "It is vital to a constitutional judiciary." Hughes, Grounds and Rudiments of Law, II, 521. See also note in 8 Mich. L. Rev. 315. In the same way many contend that to take verdicts upon points of law reserved, with power to render judgment upon the verdict or upon the point reserved, if conclusive, as the court shall finally determine the law upon the point, "strikes a blow at trial by jury," since there may be a judgment without the empty form of a general verdict. What is, in this connection, a purely historical form is regarded as in some way a necessary safeguard, notwithstanding the obvious delay and expense involved in the retrials which it entails. See remarks of Mr. Gregory, Rep. Am. Bar Ass'n, XXXIV, 74; also the debate on the same proposition in 1908, Rep. Am. Bar Ass'n, XXXIII, 33–49, and in 1910, Id. XXXV, 56–66, and in the New York State Bar Ass'n in 1912, Rep. N. Y. State Bar Ass'n, XXXV, 376–390.

[45] Rules of the Supreme Court (England), order 2, rule 1, order 18 *a*; Consolidated Rules of the Supreme Court for Ontario, rules 138, 245. See also Wheeler, Review of the New Jersey Practice Act, 75 Cent. L. Journ. 144; Whittier, Judge Gilbert and Illinois Pleading Reform, 4 Ill. L. Rev. 178; Pound, Some Principles of Procedural Reform, 4 Ill. L. Rev. 388, 491; Comments of Professor Mendelssohn-Bartholdy in Rheinische Zeitschrift für Zivil und Prozessrecht, IV, 134. "There was just one genuine archaic element that persisted in the decadent forms of common-law pleading: the imperious desire for an authoritative decision of some kind rather than the best or most complete solution. Down to the latest period of unreformed pleading this was declared to be a fundamental principle, and we have no doubt that, being repeated by so many sages of the law, the declaration was made with perfect sincerity. Those learned persons might have known, if they had ever considered the matter with their eyes open, that their ideal was incompatible with any practical handling of modern disputes arising out of modern affairs." Pollock, Genius of the Common Law, 36.

Interpretation of legal precepts, of instruments and of transactions, is likewise formal in this period of strict law. Danz says of the *ius ciuile:*

"The oldest law of the Romans recognized no will other than the expressed will, the *dictum.* What is not spoken is not willed, and *vice versa,* that only is willed that is expressed. Therefore the word operates in legal transactions entirely independent of the thought which it should express. It is not that the *verba* are efficacious so far as they include the *voluntas,* but, for the law, their literal content is the *voluntas* itself. The rule is not, 'what thou hast willed and expressed shall be *ius,*' but only 'what thou hast expressed.' It is the very nature of the *strictum ius* that the will as such is without meaning." [46]

This is no less true of the beginnings of our own law.[47] No doubt, as Ames has said, it is in large part the unmoral primitive attitude of literalness applied to interpretation.[48] But formal literalness in interpretation is closely connected with the severe formalism of the strict law in every connection, and has its roots also in the same necessity of an impersonal, mechanical, speedy decision in a way not admitting of dispute which is behind most of the rigid forms of archaic procedure. Finally, it grows in part out of the sacred character of forms and of texts, deviation from the letter whereof, therefore, is manifestly impious and dangerous. Something of the latter feeling, in a period of absolute political theory, when a sort of sanctity is attributed to legislation, as an emanation from the sovereign people, leads many who assume that they are advocates of progress to denounce courts for endeavoring to give reasonable interpretations to statutes, assuming that any departure from the sacred literal text is usurpation.[49]

Substantive law likewise, in the period of strict law, is highly formal. "Estates in land," Coke tells us, "begin in ceremony and end in ceremony." [50] Conveyances, to be given effect, must con-

[46] Lehrbuch der Geschichte des römischen Rechts, I, § 142. *Cf.* "At the beginning of the history of law one might write this motto: 'In principio erat verbum.'" Jhering, Geist des römischen Rechts, III, § 49.

[47] See Ames, Law and Morals, 22 HARV. L. REV. 97, 100–101; Gray, Restraints on the Alienation of Property, 2 ed., § 74 *b.*

[48] Law and Morals, 22 HARV. L. REV. 97.

[49] *E. g.,* Smith, Spirit of American Government, 112; McCarthy, The Wisconsin Idea, 268–269; Roe, Our Judicial Oligarchy, chap. 4.

[50] Co. Lit. 214 *b.*

form to arbitrary formal requirements.[51] The important contract is the formal contract, the *nexum* or *sponsio* or *stipulatio* in Roman law, the specialty in Anglo-American law, in which the form is more than evidence, it is the very contract.[52] Consequently in Roman law, until the fusion completed by Justinian's legislation, we find always two sets of institutions and of rules. There are civil acquisition and natural acquisition, civil incapacities and natural incapacities, civil servitudes and praetorian servitudes, civil obligations and natural obligations. In the same way in the Anglo-American legal system, there are two sets of institutions, legal and equitable, and two sets of rules, legal and equitable, in every part of the private law. We say of these that equity looks to the substance and not the form, and the implication that the law, used in the sense of the older element, which grew up in the courts of common law, looks to the form is entirely in accord with the truth. In each case, the civil or the common-law rule or institution, which is formal, represents the stage of the strict law, while the natural or praetorian or equitable rule or institution, which is substantial, represents the later stage of equity or natural law.

What are the reasons for this formalism of the period of strict law?

For one thing, forms prevented dispute. The form was fixed. It was known or should be known by all. Men's ideas might differ as to whether there was something novel, called a substantial right, contained in or behind the form, and if so, as to what it was. But the form allowed no scope for such disputes, and in the beginnings of a legal system, as well as in the pre-legal period, a chief end is to avoid dispute. In any age or in any place where men are inclined on slight provocation to take the righting of wrongs into their own hands, the law that hesitates is lost.[53]

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[51] Co. Lit. 214 *b*; Gaius, I, § 119, II, § 26.

[52] Ames, Specialty Contracts and Equitable Defences, 9 HARV. L. REV. 49.

[53] *Ante*, note 29. Hanifa (the oracle of Mohammedan law) gives as a reason for holding certain sales void that they involve an uncertainty which "would occasion contention between the parties." Hamilton's Hedaya (Grady's ed.), 244. There is a certain value in this in modern law. "The advantage of formalism is that the form is for a legal act what the stamp is for coin. It fixes its value and effect in an authoritative and easily recognizable manner. It is often difficult to determine whether what is said amounts only to a willingness to treat about a matter or is an absolute contract, and the adoption of a form removes this difficulty." Brantly, Contracts, 36.

Secondly, the strict law arose and took form when there were few records and records were possible only in very exceptional cases. Most things had to be preserved in the memory of witnesses or of magistrates.[54] Ceremonial was a stimulus to memory. Men could remember that a ceremony had taken place before them, especially one which everyone knew was the only way to produce legal results. They might or might not remember that an informal transaction had taken place in their presence; they might or might not remember its details. The details of formal transactions follow fixed lines. If one knows the kind of ceremony, the details fill themselves in with certainty. The details of informal transactions, on the other hand, vary infinitely and there is no means of knowing what they were save by remembering each detail. After records came into use, the ideas and tendencies belonging to a period of no records had become established, and formalism had a long tradition behind it.[55]

Third, and most important, forms were a safeguard against arbitrary action of the magistrate at a time when there was no elaborate body of substantive rules and principles to furnish standards of decision. Hence the great tenacity with which the common law has held to forms is connected with the Germanic and the Anglo-American jealousy of arbitrary magisterial action. In later periods of formal over-refinement, such as the eighteenth century, forms may sometimes come into the law for their own sake.[56] But the forms of the period of strict law subserved a purely practical purpose. Jhering says of them:

"Form is the sworn enemy of caprice, the twin sister of liberty. . . . Fixed forms are the school of discipline and order, and thereby

[54] "It was long before the theory was forgotten that the rolls of the courts were mere aids for the memories of the justices." Pollock and Maitland, History of English Law, 1 ed., II, 667. "We are not at all sure that the justices of assize of the first half of cent. xiii usually kept rolls." *Ibid.*, note 3. See Digby, History of the Law of Real Property, 5 ed., 147. So in the Roman law, until the reform of procedure in the later empire, even judgments were pronounced orally in the presence of the parties. Bethmann-Hollweg, Civilprozess des gemeinen Rechts, II, 624.

[55] "They [*i. e.*, forms] were often retained, more or less modified, simply because they had been always associated with some particular transaction." Muirhead, Historical Introduction to the Private Law of Rome, 2 ed., 144.

[56] As to the formal, dilatory, artificial procedure of the eighteenth century, see my paper, Some Principles of Procedural Reform, 4 Ill. L. Rev. 388, 491.

of liberty itself. They are a bulwark against external attacks, since they will only break, not bend, and where a people has truly understood the service of freedom, it has also instinctively discovered the value of form and has felt intuitively that in its forms it did not possess and hold to something purely external, but to the palladium of its liberty." [57]

Indeed the main argument of those who resist procedural reform today is that elimination of formal procedure will take away the safeguards against arbitrary judicial action.[58] But relatively few forms in modern law have been devised consciously for such an end. In modern law forms are of two kinds. By far the greater number are simply survivals. Some have survived from the period of formal law. In other cases substantial rules, devised for purposes now forgotten, survive their occasion in the shape of formal requirements. The second class of forms has been devised in modern times to serve substantial modern ends. For example, seal and consideration[59] in contracts are survivals. Each centuries ago ceased to serve the purpose for which it was devised and became a formal requirement only. On the other hand the statute of frauds imposes a modern form for modern reasons, namely, to protect the social interest in security of transactions and security of acquisitions. Forms must still play an important part where the law is seeking to protect those interests. But it must be remembered that the period of strict law is a period of legal remedies. While the logical sequence is interest, right, remedy, the historical sequence is the reverse, remedy, right, interest. When remedies were known, but not rights, the only limits of the remedy were formal. The rules which make up the traditional element of a legal system often grew up with reference to quite different ends

[57] Geist des römischen Rechts, II, § 45 (5 ed., 471–472). See Heusler, Institutionen des deutschen Privatrechts, § 12; Pollock and Maitland, History of English Law, 1 ed., II, 561. Also Bleckley, C. J., in Cochran *v.* State, 62 Ga. 731, 733.

[58] See note 44, *supra*. *Cf.* Powell, Technicalities, So called, West Pub. Co.'s Docket, Jan., 1909, 6. Judge Powell argues that technicalities are "the characteristic which distinguished courts from mobs."

[59] Pollock, Contracts, 7 ed., 8; Holmes, J., in Krell *v.* Codman, 154 Mass. 454. The reason in the case of consideration is purely historical. The requirement arose from procedural difficulties which were forgotten for centuries till historians dug them up. Ames, History of Assumpsit, 2 HARV. L. REV. 1, 53, 377; History of Parol Contracts Prior to Assumpsit, 8 HARV. L. REV. 852. If today we can find a philosophical basis, consideration, as it has grown up historically, only conforms thereto in part.

from those we now seek and before the ends we now seek had been recognized. This is true especially of formal procedural rules. Today, when interests and rights are defined and remedies exist only for securing them within the defined limits, there are better means of controlling judicial action than hard and fast formal procedure.[60]

The same considerations are behind the rigidity and immutability that characterize the strict law. Conscious change appears to be at war with the very idea of law, since there are no fixed rules or settled principles to dictate its course. If the law is legislative in form, as in the case of the Twelve Tables, interpretation is the most that is permitted; for the idea of formally superseding law by new law if not inconceivable in such a period, would be startling, as implying that law was something arbitrary that could be adopted or rejected at will. In part this is no doubt a survival of the idea of sacred law, which is proper to the preceding period. But chiefly it is connected with the formal character of the strict law, since, as Jhering puts it, forms will break but not bend. Hence even a customary law or *usus fori* in this stage is fixed and unyielding.

Individualism and the unmoral attitude of the strict law are closely connected, although the latter is also connected with the formal character of the law, regarding nothing but conformity or want of conformity to the exact letter. Examples of individualism are the insistence upon full and exact performance at all events of a duty undertaken in legal form, without allowance for accident and without mercy for the defaulter,[61] the harsh standard of duress, regarding only imminent danger of life or limb,[62] the objective standard of fraud and of duress,[63] and the strict common-law doctrines as to contributory negligence and assumption of

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[60] See my paper, Some Principles of Procedural Reform, 4 Ill. L. Rev. 388, 491.

[61] For example, the provisions of the Twelve Tables as to *nexi* and judgment debtors, Bruns, Fontes Iuris Romani Antiqui, 6 ed., I, 20–21; the rule of the common law that recognized and enforced a penalty or forfeiture incurred through the rising of a river which it was necessary for the debtor to pass in order to comply with the condition of an undertaking or a mortgage, or through some like mischance, Spence, History of the Equitable Jurisdiction of the Court of Chancery, I, 629.

[62] Code, II, 4, 13; Blackstone, Commentaries, I, 129–131.

[63] "Moreover, it is not the fear of a foolish man but that which might befall even a very firm man which we shall speak of as belonging to this edict." Digest, IV, 2, 6. Compare Blackstone, Commentaries, I, 131.

risk. Examples of the unmoral attitude of the strict law are its ignoring of trusts,[64] its refusal to consider mistake, fraud or duress where one of its formal legal transactions is in question,[65] its refusal to recognize payment where a formal contract is not formally released,[66] its refusal to permit set offs,[67] its refusal to give legal effect to a mere promise, however deliberate, without more,[68] its doctrine of the independence of the two sides of a bilateral contract.[69] The idea in each case is that a man of full age must take care of himself. There is no legal paternalism or maternalism to save him from himself. If he has made a foolish bargain he must perform his side like a man, for he has but himself to blame; if he has acted, he has done so at his own risk with a duty of keeping his eyes open, and he must abide the appointed consequences. In short he must "be a good sport" and bear his losses smiling. Hence the stock argument of the strict law for the many harsh rules it enforces is that the situation was produced by the party's own folly and he must abide it.[70] But the whole point of view is that of primitive society,[71] and, despite the eulogies which have been pronounced upon these features of the strict law as molders of strong and self-reliant character,[72] it may be asserted confidently that they

[64] Institutes, II, 23, § 1; Doctor and Student, Dial. II, chap. 7.

[65] Gaius, IV, §§ 116, 117; Ames, Specialty Contracts and Equitable Defenses, 9 HARV. L. REV. 49.

[66] Gaius, III, § 168; Doctor and Student, Dial. II, chap. 6; Replication of a Serjaunte at the Lawes of England to Certaine Pointes Alleged by a Student of the said Lawes, Hargrave, Law Tracts, 323, 324–325; Finch, Law, bk. I, chap. 3, § 7.

[67] Institutes, IV, 6, § 30; Spence, History of the Equitable Jurisdiction of the Court of Chancery, I, 651.

[68] Paulus, Sententiae, II, 14, § 1; Doctor and Student, Dial. II, chap. 24.

[69] Langdell, Summary of the Law of Contracts, §§ 140–143. *Cf.* the original doctrine of the common law as to conditions in bilateral contracts: "What is the reason that mutual promises shall bear an action without performance? One's bargain is to be performed according as he makes it. If he make a bargain and rely on another's covenant or promise to have what he would have done to him, it is his own fault." Holt, C. J., in Thorp *v.* Thorp (1701), 12 Mod. 455.

[70] Britton, bk. II, chap. 2, § 6 (86); Rich *v.* Aldred, 6 Mod. 216; Reeves, History of English Law, III, 453–454; Story, Equity Jurisprudence, II, § 803.

[71] Tacitus tells us the Germans played dice as a serious business even staking their liberty, and that if one lost in such a case, he voluntarily went into slavery and "patiently allowed himself to be bound and sold." Germania, 24.

[72] Dillon, Laws and Jurisprudence of England and America, 157; Cooley, Constitutional Limitations, 7 ed., 50; Bryce, The Influence of National Character and Historical Environment on the Development of the Common Law, Rep. Am. Bar Ass'n, XXXI, 444; Mercer, The Relationship of Law and National Spirit, Rep. Am. Bar

were not devised to any such end, that at best they subserve such an end but little, and that they defeat social interests of general security and general morals and individual interests of personality and substance which the law ought to protect.

Comparing the period of strict law with the prior stage of legal development, the beginnings of law, it may be said that whereas the end of the latter is public peace the former has advanced to the more general notion of security, that whereas the means employed by the latter is composition, the former has advanced to the conception of legal remedies, and that whereas the contribution of the latter to the idea of justice is the conception of a peaceable ordering, the contributions of the period of strict law are the ideas of certainty and uniformity and of rule and form as means thereto.

4. Equity: Natural Law.[73]

A stage of liberalization, which may be called the stage of equity or natural law, succeeds the strict law. This stage is represented in Roman law by the periods of the *ius gentium* and *ius naturale*, in English law by the rise of the Court of Chancery and development of equity, in the law of Continental Europe by the period of the law-of-nature school, that is, the seventeenth and eighteenth centuries. The watchword of the stage of strict law was certainty. The watchword of this stage is morality or some phrase of ethical import, such as good conscience, *aequum et bonum*, or natural law. The former insists on uniformity, the latter on morality; the former on form, the latter on justice in the ethical sense; the former on remedies, the latter on duties, the former on rule, the latter on reason. The capital ideas of the stage of equity or natural law are the identification of law with morals,[74] the conception of

Ass'n, II, 143; Calkins, The Sufficiency of the Common Law, Proc. Neb. State Bar Ass'n, II, 59.

[73] Goadby, Introduction to the Study of Law, 107–115; Holland, Jurisprudence, 9 ed., 36–37; Korkunov, General Theory of Law (Hastings' transl.), § 17; Markby, Elements of Law, §§ 116–124; Miller, Data of Jurisprudence, 381–387, 391–407; Pulszky, Theory of Law and Civil Society, § 220; Salmond, Jurisprudence, § 13; Maine, Ancient Law, chaps. 2 and 3; Maitland, Equity, Lects. 1 and 2; Voigt, Das jus naturale, aequum et bonum und jus gentium der Römer, I (Die Lehre vom jus naturale, aequum et bonum und jus gentium der Römer); Buckland, Equity in Roman Law; Siegel, Deutsche Rechtsgeschichte, § 53.

[74] In what is perhaps the classical instance in the history of English equity, counsel

duty[75] and attempt to make moral duties into legal duties, and reliance upon reason rather than upon arbitrary rule to keep down caprice and eliminate the personal element in the administration of justice.

Four ideas of the first magnitude come into the law in this period. The first is that legal personality should extend to all human beings, that the legal unit should be the moral unit, that is, the human being, not a group, as in the beginnings of law and not an

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argued to the Chancellor "that there is the law of the land for many things, and many things are tried in Chancery which are not remediable in the common law, and some things are only a matter of conscience between a man and his confessor." The Chancellor answers: "I know that every law is or ought to be according to the law of God. And the law of God is that an executor who is badly disposed shall not waste all the goods, etc.; and I know well that if he does so and does not make amends, if he has the power, unless he repents he shall be damned in hell." Y. B. 4 Hen. VII, 5. In the same spirit, the classical Roman jurists tell us that law is "the art of what is right and equitable" and that it is "that which is always equitable and right." Ulpian (quoting Celsus), Dig. I, 1, 1, § 1; Paul, Dig. I, 1, 11. In the same spirit Continental jurists of the law-of-nature school "deviated from the positive law in particular points according to their own discretion, sometimes even going so far as to deny the validity of a positive provision because in their opinion it was contrary to the law of nature." Grueber, Introduction to Sohm, Institutes of Roman Law, 1 ed., xxv. In the same spirit likewise, in the classical writings on international law, which belong to the period of the law-of-nature school, what ought to be is regularly assumed to be the test of what is; "what is and what [the jurist] thinks ought to be law, theory and fact, law and so-called rules of nature and of right, are mixed up in a way at once confusing and misleading." Lord Russell, International Law, Rep. Am. Bar Ass'n, XIX, 253, 268.

[75] This conception and the next, which are closely connected, came into law and ethics through the influence of the Stoics, who held that τὸ καθῆκον was to be determined by reason. Following the Roman jurists, who gave a juristic development to Stoic ideas, morality was expounded as a system of laws, and it was conceived that obedience to these laws was the duty of man as a moral agent. Erdmann, History of Philosophy (Hough's transl.), I, 190; Zeller, Stoics, Epicureans and Sceptics (Reichel's transl.), 265, 287. Accordingly the classical Roman jurists insist upon "natural obligations" where one has relied on the good faith of another (Dig. L., 17, 84, § 1), although there is incapacity to contract according to the strict law (Dig. XII, 6, 13, pr., XII, 6, 38, § 2, XII, 6, 64) or the transaction fails of or has lost efficacy according to the strict law through some purely legal rule (Dig. XII, 6, 40, pr., IV, 5, 2, § 2, XLVI, 1, 8, § 3). In the same way the idea of duty plays the chief part in English equity. "Did the Chancellor ask what sort of right he was giving . . . did he ask himself under what rubric this new chapter would stand? Probably not. . . . it is scandalous dishonesty if the feoffees disregard the trust." Maitland, Equity, 30. Similarly the moral obligation resting upon a "reasonable creature" is the stock notion of the seventeenth- and eighteenth-century jurist. *Cf.* Burlamaqui, Principes du droit naturel, pt. I, chap. 5, § 10.

arbitrarily defined legal person, as in the period of strict law.[76] In this period also natural law or equity insist not only upon the widest possible extension of capacity for rights, but also upon a like extension of capacity for legal transactions. Hence they insist on throwing off all incapacities for which a "natural" reason, as distinguished from a historical explanation, cannot be given, and on making possession of normal will and capacity for legal transactions coincident.[77]

A second is that the law should look to the substance and not the form, the spirit and not the letter,[78] a result of the measuring of things by reason rather than by arbitrary rule. Examples of the changes wrought in the law by this idea are infinite. In the Roman law[79] one may mention *restitutio* in case of *capitis deminutio* (civil death), *dominium in bonis* (equitable title) in case of *traditio* of a *res mancipi* without formal conveyance, equitable freedom in case of informal manumission by letter or before witnesses, *bonorum possessio secundum tabulas* where a will was produced attested by seven witnesses, although there was a defect in the formal ceremony *per aes et libram.* In Anglo-American law, one may mention the equitable doctrines as to mortgages, the doctrine that the security follows the debt, the equitable doctrines as to penal bonds, and reformation and rescission in case of mistake. This is perhaps the most revolutionary change in legal history. But only the systems that went through this change and came to measure things by reason, instead of solely by rule and formula, have become laws of the world.

A third idea is good faith, the idea that justice demands one should not disappoint well founded expectations which he has created, the idea that it is not so important that rules should be certain as that men's conduct should be certain. This idea, in law, flowed partly from the insistence upon reason and the substance of things, but chiefly from the identification of law with morals.

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[76] Inst. II, 2, § 2; Dig. I, 5, 4, § 1, L, 17, 32, XXXVIII, 10, 4, § 2; Gaius, I, § 158.

[77] Inst. I, 3, § 2, I, 8, §§ 1–2; Gaius, I, §§ 144–145, 190; Grotius, II, 5, §§ 1–7; Maine, Early History of Institutions, chap. 11; Maine, International Law (American ed.), 126–127; Bryce, Studies in History and Jurisprudence (American ed.), 786–824; Ehrlich, Die Rechtsfähigkeit.

[78] Voigt, Das jus naturale, aequum et bonum und jus gentium der Römer, I, 321–323; Phelps, Juridical Equity, §§ 194–204.

[79] Gaius, I, § 158, II, §§ 40–41, 101–104, 115–117, 119, IV, § 36; Dig. IV, 5, 2, § 1.

For stability is a prime characteristic of moral conduct. In general we know today what moral conduct will be tomorrow. The unprincipled may or may not keep promises, may or may not pay debts, may or may not be constant in business or political or family relations. The term trustworthy, which we apply to one whose conduct is moral, speaks for itself. We say his word is as good as his bond. We have confidence in the stability of his course of life. In the stage of equity or natural law, there is an endeavor to make moral duties of good faith into legal duties, and it largely succeeds. In Roman law, through the words "whatever in good faith," inserted in the formula, except for formal contracts, where the action was *stricti iuris*, the obligation of contract came to be one of doing whatever good faith required in such a transaction.[80] Accordingly, in contrast with the formal contract of the strict law, in which the rule was in the words of the Twelve Tables, "as he declares orally, be that law,"[81] in the *negotia bonae fidei*, even where the promise was certain, the resulting *obligatio* was always uncertain. The parties were bound to perform what could be required fairly and reasonably under the circumstances of the case and certain duties were imposed upon them by the very nature of the transaction, whether expressly undertaken or not.[82] In English law, equity, insisting rigorously upon the utmost good faith and disinterestedness in the conduct of trustees, extended the requirement to all fiduciary relations and undertook to enforce specifically the duties of good faith which it held to be involved in such relations.[83] In the same spirit, the canon law insisted upon performance of agreements although they were not legally valid as contracts,[84] and the seventeenth and eighteenth century jurists, by means of the idea of natural law, induced the law of Continental Europe

[80] According to Cicero, Q. Mucius Scaeuola, jurisconsult and *pontifex maximus* was wont to say that the greatest efficacy was to be found in those actions in which the words "in good faith" were used in the formula, that the name "actions of good faith" was of the widest application, being used in guardianships, partnerships, pledges, mandates, sales, and lettings and hirings, so that in these, as they admitted of set-offs and cross actions, it was the work of a strong judge to determine what each ought to perform for the other. De Officiis, III, 17, § 70.

[81] VI, 1. "Uti lingua nuncupassit ita ius esto."

[82] Sohm, Institutionen des römischen Rechts, 12 ed., § 76. See Ames, Law and Morals, 22 HARV. L. REV. 97, 106.

[83] See Maitland, Equity, 82–83.

[84] Sext, i, 18 (de pactis).

to throw over the Roman categories of contract and to hold all engagements or undertakings, entered into with the intention of creating an obligation, to be legally binding.[85]

A fourth idea is that one person should not be enriched unjustly at the expense of another. Partly this is a phase of looking at the substance rather than the form, an idea that one should not profit by the form if the substance fails. But chiefly it is a moral idea, an idea that justice involves an equivalency[86] and that it is dishonest to take something for nothing unless by way of an intended gift. This idea is behind nearly the whole law of quasi contract and, in our law, constructive trusts, the doctrines of equity as to merger, and subrogation. In the Roman law it is behind the innominate contracts, and similarly in our law of contracts, in the form of insuring the agreed equivalent, it is behind the doctrine of conditions implied in law and the corresponding doctrine of mutuality of performance in equity.[87]

On the other hand, the attempt to make law coincide with morals leads to two difficulties. One is an attempt to enforce over-high ethical standards and to make legal duties out of moral duties which are not sufficiently tangible to be made effective by legal means. An example of the former may be seen in the impossible standard of disinterestedness which equity imposed upon trustees until legislation intervened.[88] The attempt in Roman law to make gratitude into a legal duty will suffice as an example of the latter.[89] This tendency gradually remedies itself. The other

[85] Grotius, bk. III, chap. 11, §§ 3–4; Pufendorf, Law of Nature and Nations (Kennet's transl.), bk. III, chap. 4; Burlamaqui, Principes du droit naturel, pt. I, chap. 7; Pothier, Obligations, pt. I, chap. 1, § 1.

[86] So that something of the same idea is behind our maxim "equality is equity" and the doctrine that equity will not aid a volunteer.

[87] On this idea, as a legal principle, see Ames, Law and Morals, 22 HARV. L. REV. 97, 106; Windscheid, Lehrbuch des Pandektenrechts, II, §§ 421–423; Planiol, Traité élémentaire du droit civil, II, § 812.

[88] See the Judicial Trustees Act (1896). "This statute in effect declares that trustees may, according to the existing law, be guilty of breaches of trust not only if they act honestly, but if they act reasonably. I do not think courts of equity would have admitted that this was so, though in truth they had (so to speak) *screwed up the standard of reasonableness to what many men would regard as an unreasonable height.*" Maitland, Equity, 104.

[89] In Justinian's law, all gifts were revocable for ingratitude of the donee (Inst. II, 7, 2) unless the donee had rescued the donor from highwaymen or public enemies. Code, VIII, 56, 1 and 10. See Planiol, Traité élémentaire du droit civil, III, §§ 2637–

and the more serious difficulty is that the attempt to identify law and morals gives too wide a scope to judicial discretion, since whereas legal rules are of general and absolute application, moral principles must be applied with reference to circumstances and individuals. Hence at first in this stage the administration of justice is too personal and therefore too uncertain.[90] This overwide magisterial discretion is corrected by a gradual fixing of rules and consequent stiffening of the legal system. Some moral principles, in their acquired character of legal principles, are carried out to logical consequences beyond what is practicable or expedient[91] so that a selecting and restricting process becomes necessary and at length the principles become lost in a mass of rules derived therefrom. Others are developed as mere abstractions and thus are deprived of their purely moral character.[92] In this

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2638; Pollack, Der Schenkungswiderruf, 96; Endemann, Lehrbuch des bürgerlichen Rechts, 9 ed., I, 1036.

[90] See my paper, Justice According to Law, 13 Columbia L. Rev. 696 (subdivisions I and IV).

[91] *E. g.*, the tendency of the older chancellors to make over bargains and testamentary gifts. Drew *v.* Hanson, 6 Ves. 675, 678. See also the observations of Sir Frederick Pollock on "the ingenuity of our equity judges in supplying provisions which testators and settlors have omitted to express." 24 L. Quart. Rev. 117. Also the older doctrine of equity as to the language which will create a trust. "In hearing case after case cited, I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed." James, L. J., in Lambe *v.* Eames, L. R. 6 Ch. App. 597. Also the older doctrine that time could never be made of the essence merely by agreement. See Lord Thurlow in Williams *v.* Thompson and Greyson *v.* Riddle, Newland, Contracts, 2 ed., 238, 239. Compare the doctrine of *laesio enormis* in Roman law. Code, IV, 44, 2 and 9. As Judge Story well says, this begins by laying down "the broadest rule of equity and morals." Then the legislator, "struck with the unlimited nature of the proposition," turned it into a mathematical rule. Equity Jurisprudence, I, § 247.

[92] *Cf.* the rule of the French Civil Code as to *laesio enormis:* "If the vendor of an immovable has been damaged by receiving seven-twelfths less than its true price, he has the right to demand that the sale should be rescinded." Art. 1674. In our system, "modern equity," as it has been called, is full of examples of this mechanical treatment of what were once moral principles. *E. g.*, "Equity allows itself to be circumvented when it interferes with people's bargains. What Lord Compton has been charged is about ten per cent on the sum borrowed with compound interest. . . . If he had agreed to pay the £10,000 and ten per cent interest and there had been no agreement to insure, the appellants would have laid out half the annual amount for insurance, and on his death kept the sums insured. Can they be considered as having done that or its equivalent? *The resulting figures would have been the same.* I think not. *The rules of equity may be evaded but must not be infringed.*" Lord Bramwell in Marquess

way transition takes place to the next stage, which may be called the maturity of law.

It has been more usual to indicate the course of development which has been outlined above by dividing the history of law into four stages: (1) the stage of custom, coinciding with or resting on morality; (2) the stage of codified or crystallized custom, which, after a time, is outstripped by morality; (3) the stage of infusion of morality, in which, in consequence, the law becomes too fluid, and (4) by way of reaction, the stage of true legislation, another period of fixed law.[93] Such an outline, though true in its larger features, is based too exclusively upon Roman legal history. The term "custom" is open to objection, as inviting confusion between customary modes of decision or customary modes of advising litigants or expounding the law to tribunals and customary modes of popular action,[94] and it is only in Roman law that we may speak of the stage of strict law as one of codified or crystallized custom. In fact much of the Roman *ius ciuile* was developed juristically, with no more than a theoretical basis in the Twelve Tables, just as our strict common law was developed judicially. Moreover, it is doubtful whether the maturity of law is so much an era of true legislation as one of insistence upon law, that is upon rule and upon certainty, in comparison with the preceding stage, in which the insistence is on morals. But in any view the lines between the second and third and the third and fourth stages are sufficiently clear, and they have been recognized under one name or another by all who have written upon historical jurisprudence. A stage of hard and fast rule is followed by one of wide discretion in which moral ideas, developed outside of the law, supplant or make over a large part of the legal system. In time the doctrines that have been brought into the law in this infusion of morality become thoroughly legalized. As we put it in Anglo-American law, a system of equity is worked out. But

of Northampton *v.* Salt [1892] A. C. 1. One cannot read this without feeling that the court was conscious of applying a technical rule which it had no intention of carrying a whit beyond its letter. It looked at the form of the transaction, not at the intention of the parties. Yet this technical rule against clogging the equity of redemption was originally a moral principle that forbade taking unconscientious advantage of a debtor's necessities.

[93] See Amos, Science of Law, chap. 3.

[94] Gray, Nature and Sources of Law, §§ 627, 628.

by the time this system has been completely achieved the doctrines of equity have all but lost any distinctively equitable character. A remarkable example is furnished by the course of decision which led up to the English Judicial Trustees Act. The principles of equity as to liability of trustees had become so well settled and were so fixed in their application that all room for discretion in a subject particularly requiring it was gone. As a result unconscionable beneficiaries were able to use the principles of equity to work injustice until the legislature was compelled to intervene. When a statute is necessary to make equity do equity and to prevent its doctrines from working wrong and oppression we have come a long way from the chancellor who said that the law of his court was in no wise different from the law of God. This becomes even more manifest when equity is assimilated to law in procedure and legal and equitable remedies are granted in the same cause and proceeding even though an attempt is made to distinguish and appropriate different classes of causes to law and equity respectively.[95]

Comparing the stage of equity or natural law with the preceding stage we may say that whereas the end in primitive law is public peace and in the period of strict law is security, in this stage it is an ethical solution of controversies; that whereas the means employed in primitive law is composition and in the strict law legal remedy, in this period it is enforcement of duty; and that to the contribution of primitive law, namely, the idea of a peaceable ordering of society, and to those of the strict law, namely, certainty and uniformity reached by rule and form, it adds the conceptions of good faith and moral conduct to be attained through reason.

5. The Maturity of Law.

As a result of the stiffening process by which the undue fluidity of law and over-wide scope for discretion involved in the identification of law and morals are gradually corrected, there comes to be a body of law with the stable and certain qualities of the strict law yet liberalized by the conceptions developed by equity or natural law. In this stage of matured legal system, the watch-

[95] See my paper, The Decadence of Equity, 5 Columbia L. Rev. 20, 28–35.

words are equality and security. The former idea is derived partly from the insistence of equity or natural law upon treating all human beings as legal persons and upon recognizing full legal capacity in all persons possessed of normal wills, and partly from the insistence of the strict law that the same remedy shall always be applied to the same state of fact. Accordingly as used here, equality includes two things: equality of operation of legal rules and equality of opportunity to exercise one's faculties and employ one's substance.[96] The idea of security is derived from the strict law but is modified by the ideas of the stage of equity or natural law, especially the idea of insisting upon will rather than form as the cause of legal results and the idea of preventing the enrichment of one at the expense of another through form and without will. In consequence, security, as used here, includes two things: the idea that everyone is to be secured in his interests against aggression by others, and the idea that others are to be permitted to acquire from him or to exact from him only through his will that they do so or through his breach of rules devised to secure others in like interests.[97]

In order to insure equality, the maturity of law again insists strongly upon certainty and in consequence this stage is comparable in many respects to the stage of strict law. It is greatly in advance of the stage of strict law, however, because it insists not merely on equality of application of legal remedies, but on equality of rights, that is equality of capacities to influence others through the power of the state, and conceives of equality of application of legal remedies as only a means thereto.

To insure security, the maturity of law insists upon property and contract as fundamental ideas. This is brought out in our

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[96] On the idea of equality in the maturity of law, see Bentham, Theory of Legislation, Principles of the Civil Code, pt. 1, chap. 2; Clark, Practical Jurisprudence, 110–114; Stephen, Liberty, Equality, Fraternity, 189–255; Maine, Early History of Institutions (American ed.), 398–400; Miller, Data of Jurisprudence, 379–381; Lorimer, Institutes of Law, 2 ed., 375–414; Ritchie, Natural Rights, chap. 12; Röder, Grundzüge des Naturrechts, II, §§ 106–119; Lasson, System der Rechtsphilosophie, 376–377; Demogue, Notions fondamentales du droit privé, 136–142.

[97] On the idea of security in the maturity of law, see Bentham, Theory of Legislation, Principles of the Civil Code, pt. 1, chaps. 2, 7; Lorimer, Institues of Law, 2 ed., 367–374; Gareis, Science of Law (Kocourek's transl.), 33; Demogue, Notions fondamentales du droit privé, 63–110.

American bills of rights. Thus, the Massachusetts Bill of Rights provides:

"Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property according to standing laws." [98]

Liberty in such connections was taken to mean in the nineteenth century, and is still sometimes taken to mean, that the individual shall not be held legally unless for a fault, unless for an act on his part which infringes another's right,[99] and that another shall not be permitted to exact of him except as and to the extent he has willed a relation to which the law in advance attached such power to exact.[100] The same idea appears in the modern Roman law in the insistence upon will as the central point in legal transactions[101] and the nineteenth-century attempt to make the Anglo-American law of contracts conform to the Roman conception[102] was quite in accord with the spirit of the time.

Along with liberty the maturity of law puts property, that is, the security of acquisitions. But one of these acquisitions may be a power to exact from a promisor. Accordingly contract acquires a property aspect. The law is regarded as existing to secure the right to contract freely and the right to exact a performance freely promised as widely as possible.[103] Moreover in this stage even personality acquires a property aspect.[104] The power of the individual

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[98] Mass. Bill of Rights, art. X.

[99] Ives *v.* South Buffalo R. Co., 201 N. Y. 271. See Wambaugh, Workmen's Compensation Acts, 25 HARV. L. REV. 129.

[100] "The whole idea is that of a domain in which the individual is referred to his own will and upon which government shall neither encroach itself nor permit encroachments from any other quarter." Burgess, Political Science and Constitutional Law, I, 174.

[101] "The conception of the legal transaction is a product of modern *Systematik*." Dernburg, Pandekten, I, § 91.

[102] See Harriman, Contracts, 2 ed., §§ 651, 652.

[103] "The privilege of contracting is both a liberty and a property right, and if A. is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which B., C., and D. are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is denied the right to contract." Frorer *v.* People, 141 Ill. 171, 181 (passing on a statute against company stores).

[104] "For purposes of the civil law of defamation reputation is regarded as a species of property." Bower, Code of Actionable Defamation, 275. Compare the argument in Roberson *v.* Rochester Folding Box Co., 171 N. Y. 538, where the so-called right of

to make contracts freely is thought of primarily as a sort of asset. In other words, physical integrity and free motion and locomotion, physical and mental, are thought of as species of natural acquisitions,[105] as it were, so that the security of acquisitions, which is conceived to be the main end of the law, includes (1) natural acquisitions, that is, what nature has given one in the way of physical and mental powers, (2) what one has acquired through the position in which he found himself in society, and (3) what one has acquired through the free exercise of his natural powers. In the maturity of law men may be willing to agree that acquisitions of the second type shall be restricted greatly or even cut off for the future, but all idea of interfering with what has been so acquired in the past appears intolerable.[106] From the point of view of this stage of legal development, Mr. Choate was entirely justified when he said, in his argument in the Income Tax Cases, that a fundamental object of the law was "preservation of the rights of private property." [107]

Although it may be too soon to speak with assurance, the permanent contribution of the stage of maturity of law appears to be

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privacy was in question, to the effect that "equity has no concern with the feelings of an individual . . . except as the inconvenience or discomfort which the person may suffer is connected with the possession or enjoyment of property."

[105] Compare the notion of natural incapacities to contract, to which the legislature cannot add new ones based upon modern industrial conditions. State *v.* Loomis, 115 Mo. 307, 315; State *v.* Goodwill, 33 W. Va. 179. Professor Terry has called attention to the "use of the word 'property' . . . to include almost all . . . actually valuable rights." Leading Principles of Anglo-American Law, § 350. Blackstone treats of contract in his subdivision "Rights of Things" as a mode of transferring property, bk. III, chap. 20.

[106] "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?" Marshall, C. J., in Fletcher *v.* Peck, 6 Cranch, 87.

[107] 157 U. S. 429, 534. Compare Blackstone: "So great moreover is the regard of the law for private property that it will not authorize the least violation of it; no, not even for the general good of the entire community. . . . Nor is this the only instance in which the law of the land has postponed even public necessity to the sacred and inviolable rights of private property." Commentaries, II, 139–140. See also the remarks of Harlan, J., in Chicago, B. & Q. R. Co. *v.* Chicago, 166 U. S. 226, 239. It is of interest to note that Strong, J., in *Ex parte* Virginia, 100 U. S. 340, 347, inverts the order of words in the constitution and speaks of depriving another of "property, life or liberty without due process of law."

the idea of individual rights. As the strict law replaces the primitive idea of composition with the broader conception of legal remedy, of which composition, at best, can be no more than a species, and the stage of equity or natural law goes behind the idea of remedy to that of duty, which the remedy is but a means of enforcing, the maturity of law again goes deeper and finds behind each duty in private law a right to which the duty is correlative and for the maintenance whereof the duty is imposed. This is a thoroughly modern conception. The Romans spoke of actions *in rem* and *in personam*, we speak of rights *in rem* and *in personam*. At the very end of Roman legal development in the ancient world, the Digest was arranged in the order of the perpetual edict, in other words upon purely procedural lines.[108] In the same way, until the last quarter of the nineteenth century we taught and expounded the common law from the standpoint of actions and remedies rather than of rights. It is only a generation ago that the law of torts began to be emancipated from the bonds fixed by the actions of trespass and trespass on the case and to be expounded upon the basis of the legal rights secured.[109] As often happens in such connections, we are systematizing the whole law upon the basis of rights just as that conception is beginning to yield its central position in legal science because of the discovery of a more fundamental conception behind it.

Comparing the maturity of law with the stages which preceded it, the ends of law in this stage are equality of opportunity and security of acquisitions; the means employed is maintenance of rights; the contribution to the science of administering justice is the thorough working out of the idea of individual rights. In this stage individual rights are put at the foundation of the legal system, so that duties are but correlative thereto and remedies but vindications thereof. As has been said above, the all-important legal institutions of this stage are property and contract.

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[108] See Roby, Introduction to Justinian's Digest, xxxi–xxxiii.

[109] There is a curious parallel in the history of Japanese law. Japanese legal historians recognize three periods of development. "Until the third period [*i. e.*, the period of occidental influence] law was not clearly differentiated from social ethics; until 1868, indeed, there was no word in the Japanese language that expressed the idea of a legal right, a fact which indicates that social relations were viewed exclusively from the side of duty." Munroe Smith, The Japanese Code and the Family, 23 L. Quart. Rev. 42, 43.

6. The Socialization of Law.[110]

Toward the end of the nineteenth century a tendency became manifest throughout the world to depart radically from the fundamental ideas which had governed the maturity of legal systems. In 1891 Jhering[111] formulated it thus: "formerly," he said, there was "high valuing of property, lower valuing of the person;"[112] the line of growth was "weakening of the sense of property, strengthening of the feeling of honor."[113] In the maturity of law, the legal system seeks to secure individuals in the advantages given them by nature or their station in the world and to enable them to use these advantages as freely as is compatible with a like free exercise of their faculties and use of their advantages by others. As has been said, to accomplish these ends it reverts in some measure to the ideas of the strict law. In consequence a certain opposition between law and morals develops once more, and just as the neglect of the moral aspects of conduct in the stage of strict law required the legal revolution through infusion of lay moral ideas into law which in different legal systems we call the stage of equity or natural law, so the neglect of the moral worth of the individual and of his claim to a complete moral and social life, involved in the insistence upon property and contract in the maturity of law, are requiring a similar revolution through the absorption into the law of ideas developed in the social sciences.

Juristically the change began with the recognition of interests as the ultimate idea behind rights. It began when jurists saw that the so-called natural rights are something quite distinct in character from legal rights; that they are claims which human beings may reasonably make, whereas legal rights are means which the state

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[110] Jhering, Scherz und Ernst in der Jurisprudenz, 9 ed., 408–425; Charmont, Le droit et l'esprit démocratique, chap. 2 (La socialisation du droit); Pound, Social Justice and Legal Justice, Proc. Mo. Bar Ass'n, 1912, 110, 75 Cent. L. Jour. 455. See also Berolzheimer, System der Rechts und Wirthschaftsphilosophie, II, § 40; Gumplowicz, Die soziologische Staatsidee, 115 *et seq.*; Stein, Die Soziale Frage im Lichte der Philosophie, 2 ed., 336 *et seq.*

[111] In the additions to the fourth edition of his Scherz und Ernst in der Jurisprudenz. See the preface to the fourth edition in that or any subsequent edition.

[112] Scherz und Ernst in der Jurisprudenz, 9 ed., 418.

[113] Id., 439. This states the matter well if by "honor" we understand the idea of the moral worth of the individual.

employs in order to give effect to such claims within certain defined limits. But when natural rights are put in this form it becomes evident that these individual interests are at most on no higher plane than social interests, and, indeed, for the most part get their significance for jurisprudence from a social interest in giving effect to them. In consequence the emphasis comes to be transferred gradually from individual interests to social interests.[114] Such a movement is taking place palpably in the law of all countries today. Its watchword is satisfaction of human wants, and it seems to put as the end of law the satisfaction of as many human demands as we can with the least sacrifice of other demands. This new stage of legal development may be called the socialization of law.

Let us leave the theory of this socialization of law for another place and look instead at what is actually going on in legal systems. Seven points appear especially noteworthy, namely, (1) limitations on the use of property and the so-called anti-social exercise of rights, (2) limitations on freedom of contract, (3) limitations on the *ius disponendi*, (4) limitations on the power of the creditor or injured party to exact satisfaction, (5) imposition of liability without fault, particularly in the form of responsibility for agencies employed, (6) change of *res communes* and *res nullius* into *res publicae*, and (7) insistence upon the interest of society in dependent members of the household.

In the growing tendency of the law to impose limitations upon the use of property, especially limitations designed to prevent what the French call abusive or anti-social exercise of rights, there is a suggestive parallel between the period upon which we are entering and the earlier period of liberalization which has been called the stage of equity or natural law. Equity sought to prevent the unconscientious exercise of rights; today we seek to prevent the anti-social exercise of rights. It is true analytically there is a logomachy in the phrase "abuse of rights" or "abusive exercise of rights." As it has been put, "the right ceases where the abuse begins."[115] But such criticisms come after the change

[114] As a striking example, compare the provisions as to exact proportional equality in taxation which were common in American state constitutions in the nineteenth century (*e. g.*, Const. Ind., 1851, art. X, § 1; Const. Ill., 1870, art. IX, § 1; Const. Mo., 1875, art. X, §§ 4, 6, 7) with the exemptions and graduation in recent taxation of incomes.

[115] Planiol, Traité élémentaire du droit civil, II, § 871.

has taken place and express what has been accomplished. After equity had interposed regularly to prevent certain unconscientious uses of certain rights or powers recognized by the strict law, it was possible for the analytical jurist to say that equity simply held down the exercise to the true scope of the right or power.[116] In the same way we may say today that what the law is doing is to define the right more accurately and circumscribe the action of the person entitled by the limits so defined. Equity imposed moral limitations. The law today is beginning to impose social limitations. It is endeavoring to delimit the individual interest better with respect to social interests, and to confine the legal right to the bounds of the interest so delimited. One example may be seen in the development of legal doctrine as to acting or building upon one's land with the sole motive of injuring another.[117] The strict law starts with the proposition announced by Gaius: "no one is held to act wrongfully who exercises his right." [118] In the classical jurists, because of the identification of law with morals, a tendency develops to qualify such statements by adding "provided he does this, not with the intention of injuring his neighbor, but in order to improve his land," [119] or "but malice is not to be indulged." [120] The old French law proceeded upon a theory of the "free exercise of rights;" in contrast with which the recent theory of "abusive exercise of rights" has arisen. The German code expressly forbids the use

[116] "The question depends entirely upon the legal effect to be given to the words 'without impeachment of waste,' and that cannot depend upon the kind of court in which the question happens to arise. Yet the practical consequence of this diversity of views is that there is a remedy in equity against the tenant . . . while there is none at law; and this gives to the act of the tenant the semblance of being an equitable tort. In truth, however, the act is a legal tort, if the view taken by courts of equity is correct." Langdell, Brief Summary of Equity Jurisdiction, 251–252. Analytically this is true. But the chancellors "set up a superior equity" (Lord Hardwicke in Rolt *v.* Somerville, 2 Eq. Cas. Abr. 759, pl. 8) and interfered to prevent "an unconscientious use . . . of a legal power."

[117] Ames, How far an Act may be a Tort because of the Wrongful Motive of the Actor, 18 HARV. L. REV. 411; Walton, Motive as an Element in Torts in the Common and in the Civil Law, 22 HARV. L. REV. 501; Wigmore, Cases on Torts, II, App. A, §§ 262, 271–272; Stoner, The Influence of Social and Economic Ideals on the Law of Malicious Torts, 8 Mich. L. Rev. 468; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, § 77; Planiol, Traité élémentaire du droit civil, II, §§ 870–871; Charmont, L'abus du droit, Revue trimestrielle du droit civil, I, 113; Porcherot, De l'abus du droit; Salanson, De l'abus du droit.

[118] Dig. L, 17, 55.

[119] Dig. XXXIX, 3, 1, § 12 (Ulpian).

[120] Dig. VI, 1, 38 (Celsus).

of property for the sole purpose of injuring another.[121] American case law is veering steadily to the same conclusion.[122] Another example may be seen in the change of front in American case law with respect to surface water and to percolating water, and the establishment of doctrines in which a principle of reasonable use has superseded the old and narrow idea that the owner of the surface might do as he pleased.[123] Legislative extensions of this doctrine of reasonable use of property are probably imminent. Limitations upon building which proceed, not on the interest in general security, but on a newly recognized social interest in the aesthetic, are involved in the widespread movement against bill boards.[124] Some, indeed, contend for more:

"It is probable," says Professor Jenks, "that we shall eventually make provisions that the houses along certain residence streets shall conform to the artistic sense of the community as expressed by the building inspectors." [125]

But except in the case of water upon or beneath the surface noted above, the judicial development has gone no further than to denounce the exercise of what would otherwise be rights merely to gratify spite and malice.[126] Gratification of spite and malice are not individual wants which the law is designed to satisfy. The law should not secure such an interest. More and more the tendency is to hold that what the law should secure is satisfaction of the owner's reasonable wants with respect to the property — that is, those which consist with the like wants of his neighbors and with the interests of society.

Limitations upon freedom of contract have been imposed both

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[121] § 226.

[122] See Barger *v.* Barringer, 151 N. C. 433 (1909), and the cases cited in the majority and dissenting opinions respectively.

[123] "The spirit of the English law is now to leave the parties alone; of the American law, it is, on the one hand, to permit a reasonable use of land by all, and on the other, to prohibit an excessive use by any." Wiel, Water Rights, 3 ed., I, § 744, note 12. See Huffcut, Percolating Waters; The Rule of Reasonable User, 13 Yale L. Jour. 222.

[124] Bill Board and other Forms of Outdoor Advertising, Chicago City Club Bulletin, vol. V, no. 24.

[125] Governmental Action for Social Welfare, 81.

[126] The German code makes this into a general principle governing the exercise of all legal rights, § 226. *Cf.* a similar suggestion in Dunshee *v.* Standard Oil Co., 152 Ia. 218. But see the note on this case, 25 HARV. L. REV. 296.

through legislation and through judicial decision. As examples of the former, reference may be made to statutes requiring payment of wages in cash, statutes regulating hours and conditions of labor, and statutes preventing interference with membership in labor unions.[127] Here again the parallel between the present stage of the law and the stage of equity or natural law is suggestive. The purpose of this legislation is to protect a class which is subjected to severe economic pressure against unfair advantage on the part of employers. In the same way equity sought by limiting their power of contract, to protect debtors against unfair advantage on the part of creditors. Thus, equity prevented clogs upon or bargainings away of the right of redemption[128] and overturned oppressive contracts with heirs or reversioners.[129] Equity insisted on moral conduct on the part of creditors; we now insist on social conduct on the part of employers. We insist upon protecting men against themselves so as to secure the social interest in the full moral and social life of every individual. In the law of insurance, legislation and judicial decision have co-operated to limit freedom of contract. Statutes, such as valued policy laws, provisions as to warranties and standard policy laws, have taken many features of the subject out of the domain of agreement and the tendency of judicial decision has been in effect to attach rights and liabilities to the relation of insurer and insured and thus to remove insurance from the category of contract.[130] Likewise the courts have taken the law of surety companies practically out of the category of

[127] Pound, Liberty of Contract, 18 Yale L. Jour. 454; Goodnow, Social Reform and the Constitution, 242–258; Chicago, B. & Q. R. Co. *v.* McGuire, 219 U. S. 549, 566–575. See Jastrow, Was ist Arbeiterschutz? Archiv für Rechts- und Wirtschaftsphilosophie, VI, 133, 317, 322. Probably we shall soon have to add to the foregoing legislation with respect to non-living wage, minimum wage, wage boards, and the like. See Brown, Underlying Principles of Modern Legislation, 316–321.

[128] See the discussion of this doctrine in Noakes *v.* Rice, [1902] A. C. 24, [1900] 2 Ch. 445. "This court, as a court of conscience, is very jealous of persons taking securities for a loan and converting such securities into purchases. And therefore I take it to be an established rule that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them." Lord Northington in Vernon *v.* Bethell, 2 Ed. 110, 113 (1761).

[129] Earl of Chesterfield *v.* Janssen, 2 Ves. Sr. 125.

[130] See Wambaugh, Cases on Insurance, preface.

suretyship, treating them as insurers rather than as sureties.[131] More important, judicial decision has established that the duties of public service companies are not contractual, flowing from agreement, but quasi-contractual, flowing from the calling in which the public servant is engaged.[132] Here again, comparison should be made with the restriction of free contract by equity.[133]

Limitations on the *ius disponendi* are chiefly statutory. Four examples may be noted: the requirement in many states that the wife join in a conveyance of the family home even though it is the sole property of the husband,[134] the spendthrift trust, sometimes legislative, but chiefly judicial in origin,[135] legislation requiring that the wife join in a mortgage of the household furniture by the husband, even though it is his sole property[136] and legislation requiring that the wife join in an assignment of the husband's wages.[137] In all these cases the social interest in the moral and social life of each individual has outweighed individual interests of substance. In the first, second and third, however, the social interest in security of the social institutions of marriage and the family have also weighed heavily.

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[131] Compare American Bonding Co. *v.* Ottumwa, 137 Fed. 572, and Segari *v.* Mazzei, 116 La. 1026, with United States *v.* Boecker, 21 Wall. 652.

[132] Wyman, Public Service Companies, I, § 331. Professor Wyman says of this: "It may once have been the ideal of industrial freedom that a man might do as he pleased with his own, in any event that is no longer our notion of social justice." Id., § 35, preface (p. ix). Again: "Individual freedom is limited by the modern notion of social justice." Id., § 35.

[133] Some tendency has been manifest to deal in a similar way with certain classes of contracts between ordinary individuals, *e. g.*, the course of decision in New York as to express conditions in building contracts. "Because the right to contract as one chooses is in general sacred in the eyes of the common law, we start with the proposition that express conditions, having been put into the contract by the parties, must be strictly complied with." Costigan, Conditions in Contracts, 10. In New York, however, such conditions are treated as if they were not imposed by the parties but were like the conditions "implied in law," which are imposed by the law. Nolan *v.* Whitney, 88 N. Y. 648; Doll *v.* Noble, 116 N. Y. 230.

[134] Thompson, Homesteads and Exemptions, § 465.

[135] Gray, Restraints on the Alienation of Property, 2 ed., viii–ix. While the justification of the spendthrift trust, so far as it may be justified, is to be found in the social interests behind these limitations upon the *ius disponendi* and those upon the power of the creditor to exact satisfaction presently to be considered, it is a very crude device to those ends and thoroughly deserves Professor Gray's strictures.

[136] Ill. Rev. St. 1909, chap. 95, § 24.

[137] Mass. Acts of 1908, chap. 605.

Limitations of the power of the creditor or injured party to exact satisfaction have a longer history. Roman law in the classical period developed two limitations of this sort, *cessio bonorum* and the *beneficium competentiae*. *Cessio bonorum* was a voluntary surrender of the debtor's property to his creditors. By making such a surrender, he escaped the *infamia* that attended universal execution against a debtor's property, escaped execution against his person, and obtained the *beneficium competentiae* as to after-acquired property.[138] Thus it was a sort of voluntary bankruptcy, except that there was no general discharge. The *beneficium competentiae* is more important for our purpose. In the case of certain debtors, as against certain creditors, the Roman law in the classical period gave the benefit or privilege of not being held for the entire amount but only for so much as they could pay for the time being. Later it was held that this meant what they could pay without depriving themselves of the means of subsistence. The chief cases were, claims of one partner against another, actions by a child against a parent, actions by a freedman against his patron or an ascendant or descendant of the latter (because of the duty of gratitude), and actions by the wife against the husband for *dos*.[139] With respect to the first of these cases, it should be explained that the original of partnership was the *consortium* of co-heirs.[140] Hence the idea in each case was that it was contrary to morals for the one to strip the other of all his property and leave him a pauper. But there seemed no objection to a stranger doing this, except as the debtor might avoid it by *cessio bonorum*. Naturally even this doctrine was rejected in the modern civil law as being out of accord with the individualism of the eighteenth and nineteenth centuries. Thus Baudry-Lacantinerie says:

"Suppose I am creditor of a person to whom I am bound to furnish support, if he becomes needy; I seize his property in order to obtain payment; can he meet me with what the commentators on the Roman law call the *beneficium competentiae*, and so bring it about that he be held only in *id quod facere potest* and retain what he requires to live, *ne egeat?* No. Because I owe support to a person it does not follow that I am bound to leave to him enough wherewith to live. I may take

[138] Dig. XLII, 3, 4, pr.; Code, VII, 71, 1; II, 11, 11.
[139] Dig. XLII, 1, 16, § 17; XLII, 1, 19, § 1; L, 17, 173.
[140] See Roby, Roman Private Law, II, 128, note 1.

everything from him, if necessary in order that I be paid, except that I may be bound thereupon to provide for his support if his own labor does not suffice to procure a living. It would require a formal text in order to limit the rights of a creditor with respect to his debtor to whom he owes support and no such text exists. Hence a son who is creditor of his father may proceed against him as he might against the first comer; he may pursue him *usque ad saccum et peram.* It is an impiety — but our law tolerates it." [141]

The whole spirit of nineteenth-century law is in this passage.

The German code has a number of modern provisions restricting the power of the creditor to exact satisfaction which are likened to the *beneficium competentiae* but which really often proceed more upon the newer ideas as to social justice than upon the idea of preventing impious conduct involved in the Roman doctrine. Some of these cases are, the defense to a *pactum donationis* (executory gift) that performance would impair the donor's means of living according to his station, the defense of a donee to a donor's suit for revocation of a gift that restoration would affect the donee's means of living according to his station, the power of a donor to revoke within a fixed time on the same ground, the limitation upon the liability of insane persons for torts (introduced by the code) by a proviso that the liability shall not extend to depriving him of the means of support, and the like limitation upon the duties of maintenance of ascendants and descendants.[142]

In the United States, at a relatively early date, legislation providing for exemptions from execution began to impose limitations intended to secure social interests upon the power of the creditor to exact satisfaction. Instances of this are the homestead exemptions which prevail in so many states, the personalty exemptions, which in some states go so far as to exempt $500 to the head of a family and usually make liberal exemptions of tools to the artisan, library and instruments to the professional man, and animals and implements to the farmer, and the wage exemptions, which often go so far as to put sixty days' wages to the head of a family beyond the reach of legal process.[143] There is a notable tendency

[141] Précis du droit civil, 10 ed., I, § 529.

[142] German Civil Code, §§ 528–529, 829.

[143] Thompson, Homesteads and Exemptions, §§ 40, 379; Bureau, Le Homestead ou l'insaisissabilité de la petite propriété foncière. In Germany, claims for wages, claims

in recent legislation and in recent discussion to insist, not that the debtor keep faith in all cases even though it ruin him and his family, but that the creditor must take a risk also, either along with or even in some cases instead of the debtor.

Primitive law, acting on the principle of buying off the desire for revenge, said Ames in 1908,

"asked simply, 'did the defendant do the physical act which damaged the plaintiff.' The law of today, except in certain cases based upon public policy, asks the further question, 'was the act blameworthy.' The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril." [144]

But the ethical standard of which he wrote, which came into the law in the period of infusion of morals, was an individualist ethical standard. Today there is a strong and growing tendency to revive the idea of liability without fault, not only in the form of wide responsibility for agencies employed, but in placing upon an enterprise the burden of repairing injuries without fault of him who conducts it, which are incident to the undertaking. There is a strong and growing tendency, where there is no blame on either side, to ask, in view of the exigencies of social justice who can best bear the loss, and hence to shift the loss by creating liability where there has been no fault. The whole matter of workmen's compensation and employer's liability, as dealt with in modern legislation, illustrates this.[145] The basis of such legislation is the social interest in the full moral and social life of the individual in classes that are less able to bear the burden of injuries incident to their tasks.

Again, it used to be laid down, and the doctrine came from the Roman law, that certain things, such as running water, were *res communes*, that is, no one could own them, but the use of them belonged to or could be appropriated by certain individuals, and

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under the laws as to compulsory insurance and claims for maintenance are exempt from seizure. Code of Civil Procedure, § 850.

[144] Law and Morals, 22 HARV. L. REV. 97, 99.

[145] Wambaugh, Workmen's Compensation Acts, 25 HARV. L. REV. 129; Opinion of the Justices, 209 Mass. 607; State *v.* Clausen, 65 Wash. 156; Borgnis *v.* Falk, 147 Wis. 327. See Ives *v.* South Buffalo R. Co., 201 N. Y. 271. Another illustration may be seen in the movement in England to abolish the defense of compulsory pilotage in cases where a collision is caused by the fault of a pilot carried under compulsion of law. See Law Times, Feb. 15, 1913, vol. 134, p. 392.

that certain other things were *res nullius*, that is, they belonged to no one until some one reduced them to his possession, and then they belonged to him. Wild animals were of the latter class. Recently a strong tendency has arisen to regard running water and wild game as *res publicae;* to hold that they are owned by the state, or better, that they are assets of society which are not capable of private appropriation or ownership except under regulations that protect the general social interest.[146] It is too early to say just how far this tendency will go. But it is changing the whole water law of the western states.[147] It means that in a crowded world the social interest in the use and conservation of natural media has become more important than individual interests of substance.

Finally recent legislation, and to some extent recent judicial decision, have changed the attitude of the law with respect to dependent members of the household. Courts no longer make the natural rights of parents with respect to children the chief basis of their decisions. The individual interest of parents, which used to be almost the one thing regarded, has come to be almost the last thing regarded as compared with the interest of society. The interest of the child is now thought of rather as the interest of society in the full development of the child. In other words, here also social interests are now chiefly regarded.[148]

It is now in order to consider the end of law as developed in juristic thought. This subject is reserved for a subsequent paper.

Roscoe Pound.

HARVARD LAW SCHOOL.

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[146] See the statutes in Wiel, Water Rights, 3 ed., I, §§ 6, 120; *Ex parte* Bailey, 155 Cal. 472; Geer *v.* Connecticut, 161 U. S. 519.

[147] See the Water Code for Washington (1913), §§ 1, 2. Compare also recent decisions as to flood water. Wiel, Water Rights, 3 ed., I, § 347; Gallatin *v.* Corning I. Co. (Cal., 1912), 126 Pac. 864.

[148] Mack, The Juvenile Court, 23 HARV. L. REV. 104; Breckinridge and Abbott, The Delinquent Child and the Home, chaps. 2, 11.

For another instance of the change of front which has taken place in this respect, compare the older and newer cases as to constitutionality of drainage and reclamation laws and the like.